The line between free speech and hate speech

With the rise of incidents of bigotry on U.S. campuses after the November elections, a question has come up. How can we differentiate between free and hate speech and what can we do about the latter? The answer is complex, but there is a solution to the problem. At the federal level – and contrary to popular belief – free speech is not absolute. The Supreme Court has ruled many times setting limits on speech, from child pornography cases, to desegregation advisories to specific threats of violence. The fine line comes when dealing with opposing ideologies, like the ones held by hate groups such as the Ku Klux Klan.

The main hate crime statute is the Matthew Shepard and James Byrd, Jr, Hate Crimes Prevention Act of 2009. This statute makes it illegal to physically harm people based on their race, religion, national origin, gender or sexual orientation. Yet, the statute does not cover hate speech, not does it criminalize threats of violence. Threats to inflict physical injury may be prosecutable under other hate crimes statutes, such as 18 U.S.C. § 3511 or 18 U.S.C. §249. Such threats may also be prosecutable under applicable federal laws covering incitement or communication of threats. Some laws specifically address threats directed to some federal officials or to the project of a political candidate.

However, the courts have ruled that comments made as specific and immediate threats brush up against protections in the First Amendment, regardless of a person’s race or religion. Then, the case of face-to-face comments meant to scare immediate eyewitnesses, such as violence or a riot. In 1942, a U.S. Supreme Court decision in the Chaplinsky v. New Hampshire case in which Jehovah’s Witness believer called a city marshall, saying him a “damned fascists,” articulated a “fighting words” doctrine that restricted speech intended to provide an “immediate breach of the peace.”

When specific threats are made, the courts have also determined that an actual threat (not just a vague and/or “facially” remark) must constitute a crime. In the Virginia v. Black decision of 2003, the U.S. Supreme Court determined that a cross-burning in front of someone’s property constitutes an act of verbal violence because such an act was an attempt to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. Based on that decision, to generally “kill all the Jews,” for example, is protected speech no matter how hateful it sounds, but to say “kill that Jew” who gave me an F is considered a crime. Therefore, context is very important in this case. The hateful speech was directed to an individual person, the day after the election and, while looking at the only Latino in the room, said in loud voice so everybody else could hear, “So, when are you going to be deported?” This is an example of what hate speech was specifically directed to an individual, and, therefore, is not protected speech.

A number of states go beyond federal law in criminalizing hateful speech. Many have specific laws against hate crimes and discrimination and they hereby and firmly enforce them. It is illegal in many states to target, harass, or discriminate against a person because of race, color, national origin, ancestry, gender, religion, or simply because the person has a particular political belief or is a member of a particular group. The state of New York is an example.

Yet, the most important role can be played by colleges and universities. The courts have ruled repeatedly that institutions of higher education can have stricter policies aimed at preventing certain speech or acts that create a hostile environment and they are allowing them to act based on their campus policies. We have already seen since the election how hateful some comments have been even espoused by people who have crossed those lines.

Many times those hateful words do not have to be spoken or written, because they have been communicated through social media. For example, last week the names of six African-American students from the University of Pennsylvania were added to a racist group message.

A University of Oklahoma student involved in the group was expelled from that campus. A letter from the Tulsa Community College’s president said an unsubstantiated student had been put on a level of surveillance because the college investigated his possible involvement in the racist messages.

Sometimes words may not be considered to be a considered an act of hate speech. Paintings of Jesus frequented by African-American students, tying a rope around the neck of the statue of an American Indian person, depiction of racial epithets in areas frequented by Latinos, throwing stones at mosques, painting swastikas in Jewish-related locations, or sending a painting of a Lesbian couple with a unicorn to a religious leader who had been considered for expulsion on many campuses.

Many serious issues, such as politically kissing the butt of Muslim women – something that has happened repeatedly since the November elections – are considered hate crimes to be prosecuted under the Shepard and Byrd Act.

At the end of the day it is up to academic institutions to have clear and well-defined rules on how to act in cases like the ones described above, as well as to follow procedures properly. This is process is respected and, then act fairly in expulsion or suspension of students who engage in hate crimes.

Open discussions on issues of the day should continue and be encouraged since they are at the heart of the essence of higher education. But we need to always make sure that civility and respect are upheld.

Dr. Aldemaro Romero Jr.
Letters from Academia

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Dr. Aldemaro Romero Jr. is a writer and college professor who has published extensively on topics related to diversity and inclusion. His most recent book, “Letters from Academia” can be found through several online booksellers. For more information or to contact the author, visit wecode.cs.siue.edu.